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No. 88-1332

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSTANTINE JOHN GEKAS, as TRUSTEE of MET-L-WOOD CORPORATION, Debtor,

Petitioner,

v.

FREDERICK L. PIPIN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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14 pp

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QUESTION PRESENTED

Whether this Court should review the Court of Appeals' decision affirming the district courts' denial of petitioner's Rule 60(b) motion to vacate the bankruptcy court's sale approval order, where petitioner's Rule 60(b) motion was filed more than three months after the one-year period set forth in Rule 60(b)(3), and where the secured and unsecured creditors, whom the petitioner represents, consented to the bankruptcy court order that petitioner now seeks to vacate.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

In compliance with Rule 28.1, the parent companies, subsidiaries (other than wholly owned subsidiaries), and affiliates of the corporate respondents are Pipin Industries, Incorporated; Kewanee Corporation; Wall Systems Group, Inc.; First Chicago Corporation; and American National Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In his lengthy recitation of the factual and procedural background of this case, petitioner subtly omits or misstates certain critical matters. Clarification of these points is necessary for a proper understanding of this case.

As a threshold matter, petitioner's pejorative characterizations of the conduct of the debtor, the debtor's counsel and officers, and the bankruptcy court are inappropriate

and incorrect. As the Court of Appeals for the Seventh Circuit correctly stressed in its opinion, the foreclosure sale was widely advertised, and there was no indication that any of the defendants impeded or discouraged bidding on the day of the foreclosure sale. *In the Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1019 (7th Cir. 1988). Similarly, there was nothing unusual or improper about the fact that the successful bidder, respondent Thompson, was the alleged undisclosed agent for the debtor, respondent Pipin. *Id.* at 1019. Finally, it was undisputed that Thompson, acting on behalf of Pipin, submitted the highest bid and hence should have been awarded the assets of Met-L-Wood. *Id.* at 1019.

The secured and unsecured creditors obviously had no objection to Thompson's bid, since it maximized the value of the Met-L-Wood estate for their benefit. For this reason, the secured and unsecured creditors "*consented to—indeed urged—*" the bankruptcy court's approval of the Met-L-Wood sale. *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1019 (emphasis added). Thus, the silence of the secured and unsecured creditors for over one year after the bankruptcy court's approval of the Met-L-Wood sale was both logical and understandable.

In view of this undisputed factual situation, as set forth in petitioner's own pleadings, the Court of Appeals, two district courts, the bankruptcy court, and the magistrate below unanimously concluded that Rule 60(b)(3) barred petitioner's untimely claims. As the Court of Appeals stressed, nowhere is the need for expeditious and final judicial orders greater than in the bankruptcy context. *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1019. Without such finality, "high prices will not be offered for the assets of bankrupt firms—and the principal losers (pun

intended) will be unsecured creditors." *Id.* at 1019. Accordingly, the Court of Appeals held:

> The unsecured creditors in this case had plenty of time to repent themselves of having consented to—*indeed urged*—approval of Thompson's bid. With the assets sold, there could be no hope of reorganizing Met-L-Wood; nevertheless the creditors waited six months before asking the bankruptcy judge to convert the proceeding to a liquidation and appoint an interim trustee, which the judge promptly did. The interim trustee did nothing. Gekas, though elected early in August, did not file his Rule 60 motion until the following July, almost a year later and months after he had completed his investigation.

Id. at 1019 (emphasis added).

Confronted with both the logic and precedents supporting the Court of Appeal's position, petitioner in this Court impugns the integrity of the bankruptcy court in an effort to bring this case within the "fraud upon the court" exception to Rule 60(b). To circumvent Rule 60(b) on this ground, petitioner asserts that the bankruptcy court engaged in inappropriate conduct *in an unrelated case*, and suggests that the bankruptcy court engaged in "ex parte" discussions in connection with this case. As the Court of Appeals emphasized in rejecting petitioner's "fraud upon the court" arguments, the bankruptcy court's conduct in an unrelated case had no bearing on the outcome of this matter, and the only "ex parte" contact with the bankruptcy court that was even alleged was simply for the purpose of scheduling a hearing to approve the Met-L-Wood asset sale. *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1019. Thus, based upon petitioner's own pleadings, there was no suggestion that the bankruptcy court engaged in any improper conduct in connection with this case.

SUMMARY OF ARGUMENT

Petitioner sought to set aside the bankruptcy court's order appproving the Met-L-Wood sale more than three months after the one-year period set forth in Rule 60(b). Petitioner's delay was inexcusable, particularly in light of the consent of the secured and unsecured creditors to the bankruptcy court's sale approval order. To permit petitioner to circumvent the important policies of finality and certainty underlying Rule 60(b)(3), by means of a far-reaching expansion of the "fraud upon the court" doctrine, would effectively repeal Rule 60(b)(3) and would severely undermine the finality of bankruptcy and other judicial orders.

ARGUMENT

THIS CASE DOES NOT IMPLICATE THE "FRAUD UPON THE COURT" DOCTRINE.

As his sole ground for review, petitioner urges this Court to revisit *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). In that case, this Court was confronted with the unseemly and extraordinary conduct of a patent litigant's counsel who secretly authored a law review article and then presented it in court as if it had been authored by a disinterested scholar. The lower federal courts have properly given *Hazel-Atlas* a narrow interpretation to avoid rendering the one-year limitation of Rule 60(b)(3) a nullity.

As the Court of Appeals stressed in its opinion below, fraud upon the court "must involve corruption of the judicial process itself." *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1018, *citing In re Whitney Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985). The lower federal courts have unanimously embraced this standard. *See, e.g., Amstar Corp. v. Envirotech*, 823 F.2d 1538, 1550 (Fed. Cir. 1987); *Bulloch v. United States*, 721 F.2d 713, 718 (10th Cir. 1983); *Williams v. Board of Regents*, 90 F.R.D. 140, 143 (M.D. Ga. 1981); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499, 501 (E.D. Wis.), *aff'd*, 588 F.2d 838 (7th Cir. 1978); *United States ex rel. Bonner v. Warden*, 78 F.R.D. 344, 347 (N.D. Ill. 1978); *In re Galanis*, 71 Bankr. 953, 960-61 (D. Conn. 1987); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2870 at 254 (1973). Without such a narrow reading, Rule 60(b)(3) would be abolished for all practical purposes, and challenges to otherwise final judicial orders would be repeatedly pressed long after the one-year period established in Rule 60(b)(3). The need for finality in all cases, and particularly in bankruptcy cases, is plainly paramount. This policy is well served by the Court of Appeals' decision below.

By virtue of their participation in and consent to the bankruptcy court's order approving the Met-L-Wood sale, the secured and unsecured creditors are barred by *res judicata* from prosecuting their claims herein, as the Court of Appeals correctly concluded. *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1016, 1017, 1019. Petitioner is simply the representative of these creditors. *See Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348-49 (7th Cir. 1987). An agent enjoys no greater rights than the principals he represents. *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1017.

To avoid the preclusive effect of the foregoing decisions, petitioner simply seeks an unprecedented expansion of *Hazel-Atlas*. However, *Hazel-Atlas* is nothing like this case. Petitioner alleged only a failure to disclose purportedly relevant facts, and no lawyer appearing before the bankruptcy court was claimed to have participated in the alleged scheme. The lower courts have uniformly held that allegations such as those of petitioner are insufficient to establish "fraud upon the court," as petitioner concedes. *See Petition for a Writ of Certiorari*, at 42, n. 9.

In view of the important policies of finality and certainty stressed in the Court of Appeals' decision below, the Court of Appeals' summation of this Court's observations concerning *res judicata* deserve quoting:

> Res judicata is designed to ensure the finality of judicial decisions. *Brown v. Felsen*, 442 U.S. 127, 131 (1979). It is not "a mere practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). It "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown*, 442 U.S. at 131. As we recently stated in *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985), " '[i]ts enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.' " *Id.* at 853 (quoting *Nevada v. United States*, 463 U.S. 110, 129 (1983).

Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986).

The Court of Appeals' opinion below is completely consistent with this Court's precedents. Petitioner points to no conflict among the Circuit Courts of Appeals concerning the question presented, nor does petitioner suggest a departure from this Court's bankruptcy decisions. Accordingly, petitioner's prayer for a writ of certiorari should be denied.

CONCLUSION

Respondents respectfully pray that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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